Supreme Court, U. S.
FILED
JUL 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1866

GEORGE J. SKALICKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL ARGUMENT AND AUTHORITIES UNDER QUESTION NO. 3

Since the filing of the Petition herein and the brief in support thereof, the late opinion of the Court of Appeals for the Ninth Circuit in *United States v. Conforte*, ____ F.2d ____ (45 AFTR 2d 80-1630) (CA 9, April 30,

1980) has come to our attention. In that case, the Court of Appeals vacated the sentence of the District Court for the District of Nevada under 26 USC 7201 as not being within statutory prescribed bounds. While the *Conforte* case bears only tangentially upon the situation presented in Question No. 3 of the Petition, it does involve the same statute and illustrates certain limitations in sentencing thereunder. Thus, the sentencing process, being so intermingled with the fundamental rights of a defendant as it is, may not be used by the trial judge as a vehicle to achieve an end unrelated to a defendant's prognosis for reform and in derogation of those constitutional rights. Nor may a sentence be based upon an unproven assumption. *United States v. Conforte, supra.*

While the Probation Act, 18 USC 3651, gives trial judges a wide latitude of discretion in the imposition of conditions of probation, it expressly limits the amount of restitution to "* * * actual damages or loss caused by the offense for which conviction was had." 18 USC 3651. The mere computations of the Revenue Agent and Special Agent, both of whom testified at the trial of Petitioner do not legally determine a tax liability. *United States v. Taylor,* 305 F.2d 183 (CA 4, 1962), cert. den. 371 US 894 (1962). Nor does the District Court have jurisdiction under 26 USC 7201, to make such determination. *United States v. Stoehr,* 196 F.2d 276 (CA 3, 1952), cert. den. 344 US 826 (1952).

The determination of Petitioner's tax liability can only be made by his acquescience in the assessment of a

deficiency by the Commissioner of Internal Revenue or a final adjudication by a court of competent jurisdiction. *United States v. Taylor, supra; United States v. Stoehr, supra.* See also 26 USC 6213, 6214, and 7442. No assessment has been made of the $21,061.00 ordered to be paid "as directed by the U.S. Probation Office", and, as demonstrated in the original Petition filed herein, the District Court acting under 26 USC 7201 lacks jurisdiction in the premises. Nor may it use the Probation Act and sentencing process as vehicles to acquire jurisdiction. This being true, it may not delegate to the Probation Office that which it does not have. To deprive Petitioner of the administrative and judicial procedures and the protections against arbitrary assessment of tax provided in the taxing statutes is to deprive him of equal protection of the laws, in derogation of his constitutional rights. Cf., *United States v. Conforte, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari have been mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and one (1) true and correct copy of the same to Mr. John Hannah, United States Attorney, Federal Building, Tyler, Texas 75702, postage prepaid, this the ____ day of July, 1980.

HENRY SCHWARTZ II